

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 11, 2001

No. 215219

Wayne Circuit Court

Criminal Division

LC No. 98-004724

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony-murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole for the felony-murder conviction, and a consecutive two-year term for the felony firearm conviction. He appeals as of right. We affirm.

I. Insufficiency of Evidence

First, defendant contends that the evidence presented at trial was not sufficient to find him guilty of the felony-murder and felony firearm charges beyond a reasonable doubt. We disagree. The test for determining the sufficiency of the evidence supporting a conviction is “[w]hether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding defendant’s guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Ever mindful not to invade the province of the jury and assess the weight of the evidence or the credibility of the witnesses:¹

[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found

¹ See *People v Lee*, (No. 219538 Nov 3, 2000)(stating that it is within the province of the jury to weigh the evidence and determine the credibility of the witnesses).

that the essential elements of the crime were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999)(citations omitted.)

Additionally, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Id.* (citations omitted.)

In *Carines*, *supra*, the court set forth the requisite elements necessary to establish first-degree felony murder:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, [i.e. malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *Id.* at 758-759.

Armed robbery is one of the felonies “specifically enumerated.” Furthermore, to establish a felony firearm, the prosecutor must establish that “[t]he defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

On the basis of the evidence presented at trial, a rational trier of fact could infer that defendant, a neighbor of the victim, was aware, like the other neighbors, that the victim habitually carried large sums of money on him and that he routinely left for work at about 5:00 a.m. At 5:03 a.m., the victim’s widow heard a gunshot and, upon going outside, discovered that her husband had been shot in the neck and his wallet was missing. A neighbor, Shari Cross, saw defendant leave her house² just before the shooting and begin walking towards her house. Another neighbor, LaJuan Owens, saw defendant immediately after the shooting, walking “very fast” down the street. Defendant admitted to a police officer that he was in the vicinity where the victim was shot, although he claimed that he only heard the victim moaning and groaning and then saw him lying on the ground., whereupon he just kept on walking because he did not want to get involved. A gunshot residue test performed about three hours after the shooting revealed that defendant had residue on his hands and that the residue came from a gun being fired.

Even in the absence of direct evidence identifying defendant as the perpetrator, viewing all of the testimony in a light most favorable to the prosecution, the circumstantial evidence and reasonable inferences adduced therefrom are sufficient for the jury to conclude that defendant knew the victim’s daily routine, knew that the victim’s habit of carrying large sums of money, and thus, shot and ultimately killed the victim while attempting to commit a robbery upon him. Thus, we find no error.

II. Failure to Instruct on Lesser Included Offenses

² Defendant lived in the basement of the house with the witness’ aunt.

Next, defendant contends that the trial court committed error requiring reversal by refusing his request to instruct the jury on what he refers to as lesser-included offenses of assault with intent to murder and assault with intent to do great bodily harm less than murder. The failure to give requested jury instructions is reviewed for abuse of discretion. *People v Malach*, 202 Mich App 266; 507 NW2d 834 (1993).

A. Lesser Included Offenses v Cognate Lesser Included Offenses

To determine the propriety of a request for a lesser included offense instruction, this court must make a distinction between a lesser included offense and a cognate lesser included offense. Lesser included offenses are those where it is impossible to commit the greater offense without first having committed the lesser. *People v Baily*, 451 Mich 657, 667; 549 NW2d 325 (1996). On the contrary, cognate lesser included offenses are of the same class or category, but may contain some elements not found in the higher offense. *Id.* at 667-668 (citations omitted).

Since a perpetrator can commit felony murder without committing either assault with intent to murder or assault with intent to do great bodily harm, both assaultive offenses are “cognate lesser included” offenses of felony murder both existing within the same category of serious offenses against a person. *Bailey, supra*, at 668. Before a court instructs on cognate lesser offenses, it must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Accord, if no reasonable jury could find a cognate offense because of the absence of evidence, “then the trial court should not give the requested instruction.” *Bailey, supra*, at 668.(citations omitted).

At trial, the defendant pursued a complete defense arguing that defendant did not perpetrate the crime. If this defense had succeeded, then defendant would have procured an acquittal. Accordingly, defendant’s theory of innocence coupled with his interpretation of the evidence presented, would not have supported a conviction of the cognate offense.

Defendant’s alternative argument, that the gunshot wound was not the ultimate cause of death, must also fail. To justify a lesser cognate offense instruction, “[t]here must be some evidentiary basis for the jury to conclude that the causation chain leading from the greater harm back to defendant’s admitted acts has been broken by an independent, intervening cause.” *Bailey*, at 672. On cross-examination, although trial counsel did elicit from the medical examiner that the cause of death was urosepsis,³ the medical examiner nevertheless clearly testified that the cause of the victim’s death was a “[g]unshot wound causing paraplegi[a], causing urosepsis” and ultimately death. A complete review of the evidence definitively indicates that the defendant did not provide an independent, intervening cause sufficient to break the continuous causal chain from the victim’s gunshot wound to his ultimate demise. Accordingly, the trial court did not

³ The cause of death contained in the summary created by Detroit Receiving Hospital was “urosepsis” or a urinary tract infection including the kidneys and bladder.

commit error requiring reversal by declining to instruct the jury on the cognate lesser included offenses.

III. Prosecutorial Misconduct

Defendant next contends that the prosecutor's acts of misconduct denied him a fair trial. Issues pertaining to prosecutorial misconduct are reviewed on a case by case basis. *People v Howard*, 226 Mich App 528; 575 NW2d 16 (1997). Ultimately, the test of prosecutorial misconduct is to determine whether the alleged misconduct deprived defendant of a fair and impartial trial. *Id.* at 544.

Defendant first argues that the prosecutor's continuous attempts to elicit inadmissible hearsay testimony regarding the defendant's identity in a statement from the victim to his wife while hospitalized, despite repeated sustained objections from the trial court, constituted prosecutorial misconduct and thus, deprived defendant of a fair and impartial trial. We disagree. The prosecutor's perpetual attempts to elicit this hearsay testimony despite the trial court's consistent rulings to exclude same was improper to be sure and are not condoned. Notwithstanding, the prosecutor's attempts to admit the forbidden hearsay testimony, albeit inappropriate, still did not rise to the level of misconduct sufficient to sustain a finding that the defendant was deprived of a fair and impartial trial on review of the record here presented for our consideration. The trial court not only foreclosed further questioning of the witness, but during closing arguments admonished the jurors that, "[a]ny arguments made by either side pertaining to statements of the deceased prior to his death should not be regarded by you, the jury." This unequivocal instruction establishes that the trial court jealously guarded the defendant's right to a fair and impartial trial.

Defendant further contends that the prosecutor improperly evoked sympathy for the victim in his opening statement and through the direct examination of the victim's widow. A review of the record reveals that trial counsel did not object to the challenged conduct. Accordingly, "[u]nless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice" appellate review is precluded. *Howard, supra*, at 544. Although a prosecutor is prohibited from preying upon the jury's sympathies⁴, we do not find that the prosecutor's direct examination justifies a new trial in the case *sub judice*, because any prejudicial effect could have been adequately countered with a timely request for a curative instruction. Moreover, in the final charge, the trial court specifically cautioned that, "[y]ou [the jury] must not let sympathy or prejudice influence your decision." This unequivocal instruction to the jury was a sufficient curative instruction to eradicate the stain of any residual prejudice occasioned from the prosecutor's line of questioning. Accordingly, reversal of defendant's conviction is not required.

IV. Failure to Instruct as to Stricken Testimony

⁴ *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988).

This court reviews claims of instructional error de novo. *Case v Consumers Power Co.*, 463 Mich 1, 6; 615 NW2d 17 (2000). Defendant argues that the trial court denied him due process of law because aside from ruling that the widow's testimony concerning the victim's statements as to the defendant's identity were inadmissible, it failed to further specifically indicate to the jury that such testimony was stricken and should thus be disregarded. We do not find any merit to defendant's assertion.

Although the court did not instruct the jury to disregard the testimony when received, as part of the court's final instructions to the jury, the court admonished the jurors to disregard any testimony pertaining to the victim's statements prior to his death.⁵ Indeed, "[i]nstructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.* A review of the record in the instant case reveals that this specific instruction in conjunction with the remainder of the court's instructions "[s]ufficiently protect[ed] the defendant's rights." *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). Accordingly, reversal of defendant's conviction is not warranted.

V. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel because trial counsel "opened the door to the prosecutor's misconduct," failed to object to alleged improper remarks in the prosecutor's opening statement, failed to object to the prosecutor's attempt to introduce inadmissible evidence, and failed to object when the trial court sustained certain objections but did not immediately thereafter instruct the jury that such testimony should be disregarded.

Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. Since defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for the deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999)(citations omitted).

Defendant has failed to satisfy his burden to rebut the presumption of effective assistance of counsel. With regard to defendant's argument that trial counsel opened the door to the prosecutor's misconduct, thus paving the way for the jury to hear and consider inadmissible hearsay, we find defendant's argument unpersuasive. Defense counsel's presumptive effective assistance was not diminished by eliciting evidence from the victim's wife that the victim could

⁵ Indeed, trial counsel approved the trial court's instructions to the jury. Where trial counsel approves the instructions, defendant thereby waives any objection thereto because counsel's approval "[extinguishe[s] any error." See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000)(differentiating between waiver and forfeiture stating that "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.")

not identify the shooter, and then successfully preventing the prosecutor from presenting evidence establishing that the victim was familiar with the perpetrator, especially where the defendant's identification was a central issue at trial. Moreover, no prejudice to the defendant obtained where the trial court instructed the jury that, "[t]he lawyers' questions to witnesses are not evidence," not to consider "stricken testimony," "[t]o make [their] decision only on the evidence [the court] let in and nothing else," and to specifically disregard, "[a]ny arguments made by either side pertaining to statements of the deceased prior to his death."

As to defendant's collective arguments regarding trial counsel's failure to object to the prosecutor's opening remarks concerning the victim's deterioration from the time of the shooting to the time of his ultimate death, failure to object to the prosecutor's direct examination of the victim's widow pertaining to the extensive care mandated by the victim's condition which defendant contends resulted in an attempt by the prosecutor to impermissibly prey upon the jury's sympathies and that trial counsel failed to object when the trial court sustained an objection but immediately thereafter did not indicate that such testimony should be stricken from the record, are all unmeritorious for the reasons previously discussed herein. On review of the entire record, defendant did not overcome the presumption of effective assistance of counsel, or otherwise establish by a "reasonable probability" that but for the alleged deficiencies, defendant would have been acquitted. *People v Hoag, supra*, at 6. The record does not demonstrate any error requiring reversal or otherwise require a remand for an evidentiary hearing on defendant's claim for ineffective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter